



WSBA

COURT RULES AND PROCEDURES COMMITTEE

Meeting Minutes January 23, 2012

Committee Chair Ken Masters called the meeting to order at 9:30am.

Members present: Chair Ken Masters, Katharine Bond (by phone), Roy Brewer (by phone), Steven R. Buzzard (by phone), Mario Cava (by phone), Paul Crisalli (by phone), Rebecca Engrav, Elizabeth Fraser (by phone), Justo Gonzalez, Dale Johnson (by phone), Shannon Kilpatrick, Shawn Larsen-Bright, Nicole McGrath, Kathleen Nelson, Bryan Page (by phone), Shannon Ragonesi (by phone), Ann Summers, Judge Kevin Korsmo (by phone), Judge Blaine Gibson, and Judge Rebecca Robertson. Also attending were Elizabeth Turner (Assistant General Counsel) and Anna Schmidt (WSBA Paralegal).

Minutes

The October 17, 2011 meeting minutes were approved by consensus, with a few minor changes requested by the Chair.

Chair's Report

Old Business: There was no old business to discuss. Ms. Turner reminded everyone that if their term is expiring this year they should have received an email about reapplying. The deadline is March 12, 2012.

Subcommittee Reports

Subcommittee X: Mr. Cava reported that Subcommittee X was asked to comment on proposed amendments to Criminal Rule (CrR) 4.6, submitted by the SCJA. The motivating factor for the proposed change was *State v. Mankin*, 159 Wn.App. 111 (2010), a case where a criminal defense attorney wanted to tape record an interview of a police officer. The police officer refused to allow the interview to be taped and the trial court then authorized a deposition under CrR 4.6. The Appeals Court reviewed whether (1) an attorney was allowed to tape record an interview of a police officer or whether it was a private conversation and (2) whether refusal of a witness to be recorded during an interview is a basis for ordering a deposition. The court decided that an interview is

not a private conversation and could be recorded without violating the statute and that the refusal to record the interview is not a basis to obtain a deposition.

Subcommittee X reviewed the rule and reviewed what other jurisdictions are doing with regard to depositions. Subcommittee X questioned if the requirement of good cause is sufficient to allay the Court's concerns and whether there would be protections for the witnesses. Subcommittee X also noted that the question of recording interviews was earlier addressed by the Court Rules Committee in proposed CrR 4.11, which was published by the court in 2010 and received an extensive amount of comments from various stakeholders. The proposed rule was ultimately not adopted.

Mr. Cava reported that an invitation to comment on the proposed changes to CrR 4.6 was sent out to stakeholders, who were invited to attend a subcommittee meeting. No stakeholders attended. Subcommittee X decided that proposed CrR 4.11 had certain protections which the SCJA should consider if they wish to authorize the recording of witness interviews, and that it was better not to try and modify the definition of what a deposition is. Subcommittee X drafted a response that they would like to be presented to the BOG as a response to the SCJA [see pp. 58].

Due to materials going out so late due to inclement weather, the Committee will not vote today. The Chair pointed out that Subcommittee X's proposed letter should be addressed to Justice Johnson and will first need to be approved by the BOG. The Chair will review the letter and send it back to Mr. Cava with recommendations.

Discussion of the proposed amendments continued. Judge Gibson was surprised by this proposal, which comes from the SCJA's criminal law subcommittee. When our Committee proposed a recording witness rule, this same group came out strongly against it. He opined that, in the case of a victim who is a minor, recording an interview would be preferable to a deposition where the defendant would be present. Mr. Cava explained that Ms. Ragonese sent out letters to a group of stakeholders, which included victim advocate groups, and did not receive any comments back. Judge Robertson stated that this rule, on its face, may not appear to be what it is and suggested explaining to stakeholders how this rule is similar to CrR 4.11. Ms. Turner suggested that the letter be resent to victims' rights groups and those who commented on CrR 4.11 and those who attended the WSBA BOG meetings where proposed CrR 4.11 was discussed.

Ms. Engrav commented that the issue in *State v. Mankin* is limited to law enforcement officers, and perhaps finding a solution (such as revised version of the recording rule previously discussed) that is limited to law enforcement officers may be a more acceptable proposal to stakeholders, such as victim's rights groups. Judge Gibson agreed and suggested adding a good cause requirement to this rule. Also, Judge Gibson feels it should be clarified whether the rule allows recording if the witness refuses to talk to just one (as opposed to both) counsel involved.

The Chair pointed out that the Committee must vote on this proposal at its February meeting in order to obtain BOG approval before the April 30 comment deadline. The Chair also reminded the Committee that suggested changes to the SCJA's rule language can be added to the letter, without the Committee having to actually propose a whole new rule. Ms. McGrath commented that it might be useful to have a section of the letter discussing how this rule might affect child witnesses and how child witnesses should be treated under the criminal rules. Ms. Ragonesi will redraft an invitation to comment. Mr. Cava stated their next Subcommittee meeting is scheduled for February 2 at 3:30pm.

CR/CRLJ Subcommittee: Ms. Engrav explained that the first issue, Civil Rule (CR) 5, is a holdover from last year. Mr. Brewer brought up the difficulty of trying to serve another attorney who did not have a secretary and whose work space was difficult to access (perhaps because the attorney works out of his condo). This is an access issue. The subcommittee feels there really is a problem, but is unsure of how to fix the main problem without "leading to gray areas" in their proposal. They were unsure if the term "access not permitted" is clear. There were no comments by the Committee.

The second issue is an amendment in CR/CRLJ 62. This proposal, brought forth by Roger Wynne, is simply to modify some old language in CR/CRLJ 62. There were no comments by the Committee regarding this proposal.

The Committee will discuss and vote on these two proposals at the next meeting.

MAR and ESI Subcommittees: These two groups did not have any reports.

Ms. Turner reported that the WSBA Local Rules Task Force, chaired by Justice Johnson and Lish Whitson, has drafted revised Family Law Civil Rules (FLCRs) that they will be proposing to the BOG at their next meeting for their first reading. Their goal is to decrease the proliferation of local rules in each county. The FLCRs have grown from the 8 originally approved by the BOG to approximately 80 pages, as the SCJA has requested that the body of the CRs and some of the GRs be incorporated into the proposed rules. Ms. Turner strongly anticipates that the BOG will forward these proposed rules to the Court Rules Committee to review and comment on. Mr. Silverman explained that there is no expectation by the BOG, if they forward these proposed rules to them, of a quick turn-around. Judge Gibson and Ms. Turner reminded the Committee that the BOG may prefer the original FLCR proposal that did not include the CR language.

Ms. Turner further explained that many of the 39 counties in Washington have been working on reviewing and amending their local rules in order to bring them into compliance with the CRs. Mr. Silverman added that the LRTF had developed a matrix for listing all the local rules that weren't in compliance. Despite the efforts of this Task Force, many counties still promulgated new local rules during these last six years. It's been very difficult to get cooperation on a statewide basis.

Ms. Turner stated that ATJ is also reviewing the pattern law forms, in order to make them more friendly and in “plain language.” They also reviewed the proposed amended FLCRs and requested the LRTF to change those rules to “plain language.” Although the LRTF will not take on this task, a group from the ATJ may take on this task. Ms. Turner is trying to coordinate with the ATJ so that they don’t wind up working on rules that would perhaps more appropriately be handled by or in conjunction with our Committee.

The chair stated that, regarding the ESI Subcommittee, Mr. Horowitz will soon bring proposed CR 34 in front of the ATJ Executive Committee. Depending on the ATJ Executive Committee’s decisions, there may be a new CR 34 proposal for the Committee to vote on at the next meeting.

The meeting adjourned at 10:29 a.m.